

## Are your remote working policies in accordance with the law?

<https://www.bizcommunity.com/Article/196/548/219617.html#more>

BY: LUSANDA RAPHULU AND SIAN GAFFNEY

Judging from what employees around the world are saying in surveys, many want to continue working from home, or remotely at least some of the time, and are reluctant to go back to the office full time. There have even been reports of employee resistance to back-to-the-office calls by employers in certain countries where Covid-19 vaccination programmes have reached an advanced stage and workplaces are ready for pre-pandemic occupation numbers.



Source: Tima Miroshnichenko from [Pexels](https://www.pexels.com/)

South Africa is still dealing with the pandemic, so it is unlikely that employers in general have made firm decisions about whether to go back to the office, move permanently to remote working or aim for something in between, such as a hybrid working model.

If and when they do make such decisions, employers would do well to remember that any workplace changes they make (beyond those currently necessitated by the pandemic) will have to be done within the confines of the law.

### **Point of no return**

The workplace as we have traditionally known it is rapidly evolving and is, in many instances, unlikely to exist in its previous form ever again, but the fundamental legal principles that regulate employment relationships and employment contracts generally remain the same. This means the methods or approaches an employer uses to bring about workplace changes within the confines of the law are, or ought to be, the same as those used in the traditional workplace.

Although a move to remote or home working is generally considered a win by many employees, it could have implications for traditional employee benefits such as car and travel allowances, as well as for information security, intellectual property, health and safety and other compliance matters. Employers will also need to grapple with how to deal with personal expenses, such as internet access, incurred by employees as a result of working remotely and how to deal with issues of equipment that employees may not readily have at home.



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There are two main legal principles employers would need to consider when moving towards making remote working a permanent arrangement: any desired changes must be implemented fairly, and changes must be implemented in accordance with applicable laws – which do not stop at the office door.

#### **The law reaches beyond the conventional workplace**

Employers need to consider their health and safety obligations towards employees in terms of the Occupational Health and Safety Act, which requires an employer to, among other things, do everything reasonably practicable to protect employees' health and safety in the workplace. In this regard, the employer's obligations to ensure the health and safety of its employees extend to where the employee is working outside of the conventionally understood workplace, including the home office.

Similarly, loss of vital data and intellectual property and breaches of security may have far-reaching consequences for a business whose employees work remotely. There are additional obligations with the Protection of Personal Information Act (PoPIA) now in full force, and there will be further obligations once the commencement date of the Cybercrimes Act is announced, both of which will be of particular importance for remote working.

Then there's the Basic Conditions of Employment Act, regulating working hours, overtime, annual leave, sick leave and the like, all of which need to be considered and applied whether employees work in the office or at home.

#### **Generally, consult first**

As a general principle, a contract of employment, like any other contract, is consensual and so any contractual changes must be agreed to by the parties to the contract. An employer moving towards new post-pandemic working modes would therefore (in most cases) need to consult with its employees before making any changes to their employment contracts. There are, however, exceptions to this general rule and employers may not always be required to engage in extensive consultations in respect of the desired changes.

The nature and extent of such consultations would depend on factors such as the size of the

workforce being impacted, the nature of the work the employees are doing and, most importantly, the nature and overall impact the proposed changes would have on employees' current terms and conditions of employment. The overriding principle is that any changes ought to be implemented in a manner that is both substantively and procedurally fair.



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If consultations are required in respect of changes to working conditions, such consultations would either be with the employees themselves or, if the employer's workforce is unionised, with union representatives. In a unionised working environment, an employer would also need to ensure that it complies with its obligations in terms of any collective bargaining agreement regulating working conditions.

When it comes to implementing the desired changes, employers should ensure that these are implemented fairly across the board and that there is no unfair discrimination. If there is any differentiation of working conditions, the employer must be able to justify these based on operational reasons (for example, where only some are able to work remotely, and others are required to come into the workplace due to the nature of the work being done).

Employers who wish to change their entire operations to a remote working structure should also be mindful of employees who may not have the means, infrastructure or a conducive environment to effectively perform their services from home (despite that it is possible).

### **Manage the challenges and reap the benefits**

Working from home has pros and cons for employers and employees alike and is likely to become a prominent working model in a post-pandemic world. A good place to start in bringing the benefits of remote working to the fore while managing the challenges that come with them, is for employers to look to making any required changes to the employment contracts, as well as developing a remote working policy to regulate new working arrangements.

Even if employees are overwhelmingly in favour of making working from home a permanent feature, any changes to terms and conditions of employment must be done in accordance with applicable law.

### **About the author**

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